No. 10620

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the District Court of the United States
for the District of Oregon

No. Civ. 918

EDWARD SWIDERSKI,

Plaintiff,

vs.

ALLEN L. MOODENBAUGH, improperly impleaded as OWEN G. MOODENBAUGH,

Defendant.

AGREED STATEMENT TO CONSTITUTE RECORD ON APPEAL

This is a personal injury action by plaintiff against defendant for the sum of $977.92 special damages and $35,000.00 general damages. The parties agreed upon a pre-trial order which was entered by the court on June 23, 1942. This order sets forth the basis of jurisdiction, the agreed facts and the issues of law and fact. There is only one point being raised upon this appeal and following are such portions of the pre-trial order as, in the opinion of both parties, are sufficient to acquaint the Appellate Court with the substance of the pleadings, admitted facts and issues.

"The following statement of facts was and is agreed upon by the parties and agreed to by the Court:

AGREED FACTS

I.

The correct name of the defendant in this cause is Allen L. Moodenbaugh.

II.

Plaintiff is a resident, citizen and inhabitant of Cook County, Illinois, and defendant is a resident, citizen and inhabitant of Multnomah County, Oregon, and the amount in controversy, exclusive of costs, exceeds the sum of $3,000.00.

III.

At all times involved herein Lake Road has been and is a public thoroughfare and highway running in a general easterly and westerly direction past 28th Street, within the incorporated limits of the City of Milwaukie, Clackamas County, Oregon.

IV.

On or about July 22, 1941, at about 11:45 P.M. plaintiff was driving an automobile in an easterly direction on Lake Road in Milwaukie, Clackamas County, Oregon, and defendant was driving an automobile in a westerly direction on said road at said time and place; that at a point a short distance east of the intersection of 28th Street with said Lake Road, said two automobiles collided.

V.

As a result of said accident plaintiff received some injuries, defendant conceding that plaintiff sus-

tained an initial concussion of the brain, at least a cut nose, some injury to four teeth, cut tongue, a broken left jaw, and lacerations of his chest and foot. Otherwise defendant denies plaintiff's claims of injury.

VI.

It is further agreed that as a result of said accident plaintiff sustained some loss by way of medical, hospital and nurse expense, the nature and amount, however, of same being in issue. Likewise, it is conceded that plaintiff at the time of the accident was engaged in work as a bottler at a soft drink manufacturing company in Portland, said work being semi-seasonal in nature, and that he sustained some loss of wages, but the relation between plaintiff's disabilities and said loss, and the amount thereof, are in issue.

ISSUES TO BE DETERMINED

I.

Plaintiff charges that defendant was careless, reckless and negligent in the following particulars:

1. That defendant failed to drive his car on the right half of the paved portion of the highway;

2. That defendant drove his car on the left half of the paved portion of the highway;

3. That defendant drove his automobile at an excessive rate of speed;

4. That defendant failed to keep a proper lookout for other automobiles or traffic and especially traffic coming toward him.

5. That defendant failed to pay attention to his driving;

6. That defendant failed to keep his automobile under control;

7. That defendant failed to pass plaintiff by giving plaintiff at least half of the traveled portion of the roadway;

8. That defendant turned his car into plaintiff's automobile immediately preceding the collision;

9. That defendant failed to bring his automobile to a stop;

10. That defendant drove his automobile with improper lights, to-wit: with only one light.

Defendant denies that he was negligent in any particular as charged or that any alleged act or omission as charged was a proximate cause of the accident.

II.

With respect to the allegations in subdivision 3, paragraph I supra, it is agreed by the parties that the designated speed at the place of accident was 25 miles per hour. It is the contention of plaintiff that defendant was driving in excess of 25 miles per hour and that under Section 115-320 O.C.L.A. the fact that defendant was driving in excess of 25 miles per hour, if proved, is prima facie evidence of negligence on the part of defendant. It is the position of defendant that he was not violating the basic rule and even if he was driving in excess of 25 miles per hour that would not be prima facie evidence of negligence under the doctrine of Zeek vs. Bicknell, 150 Ore. 167, which is to the effect

that the statutory designated speeds are not relevant in negligence cases and that it is improper to submit to the jury the designated speed.

III.

Plaintiff contends that as the direct and proximate result of said accident he was seriously, painfully and permanently injured and suffered the following injuries, to-wit: a severe concussion of the brain, a badly cut and broken nose, loss of four teeth, a severely cut tongue, a broken left jaw, a severe back injury, deep cut holes in his chest and foot, and numerous abraisions, contusions, sprains and muscle injuries upon numerous parts of his body, a nervous condition and a possible skull fracture.

IV.

Plaintiff further charges that by reason of said accident he necessarily incurred expenses as follows:

Hospital expenses	$119.92
Nurses' hire	78.00
Medical services	200.00
Ambulance	10.00
Loss of wages	570.00
Total	$977.92

V.

Further plaintiff contends that as a result of said accident he has suffered great pain and permanent injuries and will incur further expenses for medical and dental services in a substantial sum and

that plaintiff has been damaged in the sum of $35,000.00 general damages.

VI.

Except as otherwise admitted in paragraphs V and VI, page 2, supra, defendant denies the charges contained in paragraphs III, IV, and V, page 4, supra, and plaintiff will be placed on proof in regard thereto.

VII.

By the terms of the order of this court dated March 23, 1942, should plaintiff recover a judgment from defendant in excess of $5,000.00, plaintiff will be required to accept a remittitur of such damages, if any, as may exceed the sum of $5,000.00.

VIII.

Defendant, on his part, contends that plaintiff was careless, negligent and reckless in the following particulars, to-wit:

1. Plaintiff failed to drive on his right half of the highway, but instead drove upon his left half thereof;

2. Plaintiff failed to drive as closely as practicable to his right half of the highway;

3. Plaintiff failed to pass defendant by giving defendant at least half of the traveled portion of the roadway;

4. Plaintiff failed to keep his automobile under control or to turn same aside in time to avoid collision with defendant's automobile;

5. Plaintiff was proceeding at a rate of speed

which was unreasonable and excessive under the circumstances;

6. Plaintiff failed to maintain a proper or any lookout for vehicles approaching from the opposite direction;

7. Although said accident occurred at about 11:45 o'clock P.M. plaintiff failed to have the headlights on his automobile lighted until immediately before said collision occurred.

IX.

Defendant further contends that the aforesaid alleged negligence of plaintiff was the proximate cause of said collision and of such injuries as plaintiff may have sustained in said accident.

X.

With respect to the charges of contributory negligence made by defendant as above stated, plaintiff denies that he was negligent in any particular as contended for by defendant or that any of said alleged acts or omissions were a proximate cause of the accident."

In connection with the issue of law in paragraph II of the issues set forth in the pretrial order and which appears on page 3 of this agreed statement, the following occurred. Defendant testified in one of the depositions that was adduced as evidence, that immediately preceding the collision he was driving his automobile at about 35 miles per hour, and it is agreed that the designated speed of Lake Road according to Section 115-320 of Oregon Com-

piled Laws Annotated is 25 miles per hour. Plaintiff had submitted no requested instructions, and, in its instructions on the question of negligence and contributory negligence, the court gave the usual instructions as to the effect if the jury found for or against plaintiff or defendant on any of the issues of negligence or contributory negligence, including the issue of excessive speed. The court made no reference to the designated speed at the place of the collision and at the conclusion of the court's instructions the following occurred.

> "Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have.
>
> "The Court: Exception is granted."

Thereupon a verdict was returned by the jury for the defendant and on July 15, 1942, the court entered the following

JUDGMENT

"The above action came on regularly for trial on Tuesday, June 23, 1942, at 10:00 o'clock A.M. Plaintiff appeared in person and by and through

Reuben G. Lenske, his attorney. Defendant appeared by and through James C. Dezendorf and Dey, Hampson & Nelson, his attorneys. The jury was duly empaneled and sworn to try the issues of the case, after which opening statements of counsel were made. Witnesses for plaintiff and defendant were thereafter sworn and testified. The evidence was completed at 8:30 P.M. on June 23, 1942, at which time an adjournment was taken until Wednesday, June 24, 1942, at 9:30 A.M. Arguments of counsel to the jury were made on June 24, 1942, after which the Court instructed the jury. The jury retired to deliberate on a verdict at 12:15 P.M. on June 24, 1942, and thereafter at approximately 3:00 P.M. returned into Court a verdict in words and figures as follows, to wit: (Formal parts omitted).

> 'We, the jury, duly empaneled and sworn to try the above entitled cause, do find our verdict in favor of the defendant and against the plaintiff.
>
> Dated June 24, 1942.
>
> ROBERT S. SMITH,
> Foreman.'

The verdict so returned was duly received, filed and entered and in conformity therewith, the Court being now fully advised, it is hereby

Ordered, Adjudged and Decreed that plaintiff take nothing by his complaint, and that the same be and it hereby is dismissed; and it is further Or-

dered, Adjudged and Decreed that defendant have judgment against plaintiff for his costs and disbursements herein to be taxed.

Dated This 15th day of July, 1942.

JAMES ALGER FEE,
Judge."

Thereafter on August 14, 1942, plaintiff duly served and filed the following

NOTICE OF APPEAL

"Notice is hereby given that Edward Swiderski, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on or about July 15, 1942, in favor of defendant and against plaintiff.

REUBEN G. LENSKE,
Attorney for Edward Swiderski, 825 Yeon Building,
Portland, Oregon."

"U. S. District Court
District of Oregon
Filed August 14, 1942
G. H. Marsh, Clerk."

The sole question to be determined on this appeal is whether the court committed reversible error in not instructing the jury along the lines suggested

by counsel for plaintiff-appellant in his exception above set forth.

REUBEN G. LENSKE,
Attorney for plaintiff-appellant.
JAMES C. DYMONT,
Of attorneys for defendant-appellee.

The foregoing agreed statement to constitute record on appeal is hereby approved in accordance with Rule 76. F.R.C.P. upon presentation.

November 27, 1943.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed Nov. 27, 1943.

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing agreed statement signed by the attorneys for the respective parties and approved by Judge James Alger Fee, which said agreed statement consists of 8 pages numbered from one to eight both inclusive constitutes the record on appeal in a cause therein numbered Civil 918 wherein Edward Swiderski is plaintiff and Allen L. Moodenbaugh is defendant, and I hereby further certify that said agreed state-

ment contains a true copy of the judgment in the said cause and a true copy of the notice of appeal in said cause with its filing date.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 27th day of November, 1943.

[Seal] LOWELL MUNDORFF,
Clerk.

[Endorsed]: No. 10620. United States Circuit Court of Appeals for the Ninth Circuit. Edward Swiderski, Appellant, vs. Allen L. Moodenbaugh, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 29, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10620

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

STATEMENT OF POINTS BY APPELLANT

The following are the points upon which appellant intends to rely in the above appeal, to wit:

1. Under Chapter 458 of the 1941 Oregon Session Laws and Section 115-320 of the O.C.L.A., as amended, evidence of driving an automobile at a greater rate of speed than the designated speed for the particular area, is prima facie evidence of violation of the basic rule.

2. Where the speed of a driver is an issue in an action for negligence against such driver and there is substantial evidence that he drove at a speed greater than the designated speed under the Oregon laws, and the issue was raised upon pre-trial as an issue of law, the jury should be instructed as to the designated speed in the area in question, and it should further be instructed that a violation of such designated speed is prima facie evidence of a violation of the basic rule.

3. Since the Court refused to instruct the jury on the issues as above stated a reversible error was committed by the Court and appellant should have a new trial.

REUBEN G. LENSKE,
Attorney for Appellant.

Service is accepted at Portland, Oregon, December 4th, 1943.

JAMES C. DEZENDORF,
Of attorneys for Appellee.

[Endorsed]: Filed Dec. 7, 1943.